Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Protecting the Privacy of Broadband and Other Telecommunications Services	)	WC Docket No. 16-106
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	)	
	)	

To: The Commission

REPLY TO OPPOSITIONS TO THE PETITIONS FOR RECONSIDERATION

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SUMMARY

The Association of National Advertisers ("ANA"), American Association of Advertising Agencies ("4As"), American Advertising Federation ("AAF"), Data & Marketing Association ("DMA"), Interactive Advertising Bureau ("IAB"), and Network Advertising Initiative ("NAI") (together "Trade Associations") file this reply to the oppositions to its Petition for Reconsideration ("Petition") for the report and order titled *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services* ("Order"). The oppositions fail to rebut the statutory weaknesses described in the Petition, including the reliance on Section 222 as a basis for the Order and the fact that the Order is an unconstitutional restriction on free speech in violation of the First Amendment. The oppositions also wrongly claim that the Order is consistent with the Federal Trade Commission's privacy approach, when in fact the Order represents a significant break with that framework. The oppositions also wrongly claim that, absent the Order, a regulatory gap would exist. The Federal Communications Commission ("FCC") itself rebutted this claim when it issued an enforcement advisory in 2015 noting that Section 222 will apply to covered entities even without detailed regulations. Finally, the oppositions fail to rebut the Petition's argument that the FCC failed to provide adequate notice and time for interested parties to comment on the newly revised rules. For these reasons, as explained in full below, the FCC should grant the Petition and deny the oppositions to the Petition.

INTRODUCTION

The Association of National Advertisers ("ANA"), American Association of Advertising Agencies ("4As"), American Advertising Federation ("AAF"), Data & Marketing Association ("DMA"), Interactive Advertising Bureau ("IAB"), and Network Advertising Initiative ("NAI") (together "Trade Associations") by their attorneys and pursuant to Section 405 of the Communications Act of 1934, as amended (the "Act") (47 U.S.C. 405), and Section 1.429 of the Commission's Rules (47 C.F.R. 1.429), hereby respectfully submit this reply to the various oppositions (together "Oppositions")[1] filed regarding the Trade Associations' Petition for Reconsideration ("Petition") of the Federal Communications Commission's ("FCC" or "Commission") final Report and Order titled, *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services* ("Order" or "Rule"), which the Trade Associations submitted on January 3, 2017.[2]

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[1] Center for Digital Democracy *et al*., *Opposition to the Petitions for Reconsideration*, WC Docket No 16-106 (Mar. 6, 2016); Center for Democracy and Technology, *Opposition to the Petitions for Reconsideration*, WC Docket No 16-106 (Mar. 6, 2016); Coalition Opposition, *Opposition to the Petitions for Reconsideration*, WC Docket No 16-106 (Mar. 6, 2016); Consumers Union, *Opposition to the Petitions for Reconsideration*, WC Docket No 16-106 (Mar. 6, 2016); Public Knowledge *et al.*, *Opposition to the Petitions for Reconsideration*, WC Docket No 16-106 (Mar. 6, 2016); Free Press, *Opposition to the Petitions for Reconsideration*, WC Docket No 16-106 (Mar. 6, 2016); New America's Open Technology Institute, *Opposition to the Petitions for Reconsideration*, WC Docket No 16-106 (Mar. 6, 2016).

[2] *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Report and Order, WC Docket No. 16-106 (Nov. 2, 2016) (hereinafter *Report*); *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Final Rule, 81 FR 87274 (Dec. 2, 2016) (hereinafter "*Rule*"); Trade Associations, *Petition for Reconsideration* (Jan. 3, 2017) (hereinafter *Petition*) https://ecfsapi.fcc.gov/file/1010300614650/Petition%20for%20Reconsideration%201.3.2017_2.pdf.

The Trade Associations are the leading trade associations for advertising and marketing industries, collectively representing more than 5,000 U.S. corporations across the full spectrum of businesses that participate in and shape today's media and advertising landscape. Our members engage in responsible data practices that both deliver to consumers the goods and services they desire and also fuel economic growth. This data-driven marketplace subsidizes the online ecosystem, content, and programming that consumers value, promotes innovation, and grows the economy.[3] A recent study noted that the Data-Driven Market Economy ("DDME") generates vital revenue and jobs for the U.S. economy, adding $202 billion in revenue to the U.S. economy and fueling more than 966,000 jobs in 2014.[4] As the Trade Associations stated in the Petition, the Order would derail this well-functioning economic engine without any benefits for the consumer. For the reasons discussed below, the Oppositions fail to provide a convincing argument that the rulemaking process or the Order itself addressed the issues raised in the Petition. Therefore, the Commission should grant the Trade Associations' request for reconsideration of the Order, and deny the Oppositions.

[3] A recent Zogby Analytics poll commissioned by the Digital Advertising Alliance ("DAA") shows that consumers assign a value of almost $1,200 a year to ad-supported online content. DAA, *Zogby Poll: Americans Say Free, Ad-Supported Online Services Worth $1,200/Year; 85% Prefer Ad-Supported Internet to Paid*, PR Newswire (May 11, 2016 8:30 AM), http://www.prnewswire.com/news-releases/zogby-poll--americans-say-free-ad-supported-online-services-worth-1200year-85-prefer-ad-supported-internet-to-paid-300266602.html.

[4] Deighton and Johnson, *The Value of Data: Consequences for Insight, Innovation & Efficiency in the U.S. Economy* (2015) (hereinafter "*The Value of Data*").

I. THE OPPOSITIONS FAIL TO OVERCOME THE FACT THAT THE ORDER UNLAWFULLY RELIES ON SECTION 222 TO PROMULGATE ITS RULES IN AN ARBITRARY AND CAPRICIOUS MANNER.

The Oppositions state that it is clear that the Commission has statutory authority to promulgate the Order, but do no more than restate the text of the Act in support of their opposition.[5] The fact remains that the FCC's reliance on Section 222 to promulgate the Order was an arbitrary and capricious action. As the Trade Associations explained in the Petition, the statutory language the Order relies on is a "General Statement" and is clearly governed by the more detailed subsections that follow it.

Section 222(a) imposes a general obligation to protect "proprietary information," but the section must be read in conjunction with the more specific obligations spelled out throughout the rest of Section 222. The specific requirements in the succeeding subsections define some of the duties that Congress imposed.[6] If Section 222(a) were read to make all customer proprietary information confidential, as the Order contends, the more specific statutory provisions would be unnecessary. Under a common canon of construction, the specific language governs the general, and courts will not read a general provision to swallow, and render superfluous, more specific ones.[7] As Commissioner O'Rielly noted in his dissent to the Order, Section 222(a) explains *who* is covered by the substantive rules in other sections (all telecommunications carriers), while

[5] *See e.g.*, Center for Democracy & Technology, *Opposition to Petitions for Reconsideration*, 7-8 (Mar. 6, 2016).

[6] 47 U.S.C. § 222.

[7] *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *See RadLAX Gateway Hotel LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012).

Sections 222(b) and (c) set out substantive rules with regard to other carriers' proprietary information and CPNI.[8] The Order fails to address this point, as do the Oppositions.

The Oppositions also do not address the principle that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[9] The Order grounds its authority to create new categories of proprietary information and impose detailed regulations on the use of those new categories on a general provision that would swallow the more detailed provisions regulating the use of CPNI. From 1996 (when these provisions were enacted) until 2014, the FCC had interpreted Section 222 to govern the use of only CPNI with regard to customer data, not proprietary information broadly.[10] The Supreme Court has said that, "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism."[11] The Oppositions do not discuss how the Order provides any reasoning or explanation to overcome the skepticism that such a radical new interpretation creates.

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[8] *See* Dissenting Stmt. of Comm'r Michael O'Rielly at 1.

[9] *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001).

[10] *See Order* at ¶ 357 (acknowledging that the FCC had interpreted Section 222 to pertain to CPNI until its 2014 decision in *In re TerraCom, Inc.*, 29 FCC Rcd. 13325, when it said for the first time that Section 222(a) applied to more than CPNI).

[11] *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (internal quotation marks omitted).

II. THE OPPOSITIONS IGNORE THE FIRST AMENDMENT CONSIDERATIONS.

The Order imposes restrictions on broadband internet access service ("BIAS") providers' ability to use customer information for the purposes of commercial speech, without a customer's opt-in to such use. As the Tenth Circuit held in *U.S. West*, effective speech has two components—the speaker and the audience; a restriction on either component is a restriction on free speech.[12] The creation, analysis, and transfer of consumer data for marketing purposes constitutes speech.[13] Non-misleading commercial speech regarding a lawful activity is protected under the First Amendment.[14]

These facts remain true, and the Order and Oppositions fail to explain why the Order's restrictions further a substantial state interest, and do not show that the restrictions do so in a direct and material manner, is narrowly tailored, and is no more restrictive of speech than is necessary.[15] General pronouncements about privacy are not good enough; the FCC has to articulate a specific harm that is being remedied.[16] No specific harms have been outlined in the Order or the Oppositions, and the claims of theoretical harm do not meet the requirements set out in settled caselaw for restricting protected commercial speech.

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[12] *See U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999).

[13] *Id.*

[14] *See, e.g., Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-63 (1980).

[15] *Id.*

[16] *See U.S. West*, 182 F.3d at 1237 ("The government presents no evidence showing the harm to either privacy or competition is real. Instead, the government relies on speculation that harm to privacy and competition for new services will result if carriers use CPNI.").

The Order would seek to require opt-in approval for the use of all web browsing and app usage history information for marketing purposes outside of very limited exceptions, a radically different regime from current market practice. This shift echoes the Commission's previous failed attempt to mandate an opt-in requirement for the use of data for marketing purposes, a regime that was rejected by the Tenth Circuit.[17] The Tenth Circuit stated that the government must specifically state the substantial privacy interest it is addressing, demonstrate that it has balanced the benefits and harms its regulation imposes, and establish that the regulation is narrowly tailored to address that specific harm.[18] The Order fails to justify its restriction on constitutionally protected speech, does not perform the required cost benefit analysis, and does not offer a reason to believe that any attempt to require opt-in consent for marketing purposes would be upheld by any court upon review.

The Oppositions also do not offer such an analysis. Beyond conclusory statements that the BIAS providers' collection and use of web browsing and application use data present a unique harm to consumers, the Oppositions do not offer any justification for the more restrictive opt-in regime contained in the Order as compared to the Trade Associations' proposal for a less resistive opt-out regime, which is based on long-standing, effective industry practice and self-regulatory efforts.[19]

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[17] *U.S. West*, 182 F.3d at 1230.

[18] *U.S. West*, 182 F.3d at 1235; 1238.

[19] 4As, AAF, ANA, DMA, IAB, NAI, *Trade Association Proposal Regarding Sensitive Information and Consent Standard*, WC Docket No. 16-106 (Oct. 19, 2016) (hereinafter *Proposal*).

The Trade Associations' proposal defined web browsing and application use history separate and apart from sensitive information, and provided for an opt-out mechanism to allow consumer choice for the use and sharing of that non-sensitive information.[20] This definitional distinction respects the reality that not all web browsing and application use information is sensitive, despite the Oppositions' contentions, and that only when such information contains sensitive information (such as a Social Security number) should heightened approval requirements apply. This structure is common in the online ecosystem, and has supported the dynamic Internet economy consumers enjoy today. The Order and Oppositions fail to appropriately address the Trade Associations' proposal, nor do they justify the burdensome restrictions on speech for a different, compelling purpose.

III. THE ORDER IS NOT CONSISTENT WITH THE FTC'S PRIVACY APPROACH.

The Oppositions claim that classifying web browsing and app usage history as sensitive information is consistent with the Federal Trade Commission's ("FTC") 2012 Privacy Report.[21] The Oppositions posit, with no concrete proof, that this type of data is tantamount to other data specifically protected by an act of Congress, such as personally identifiable video viewing histories.[22] However, Congress has not passed legislation regarding the privacy implications of web viewing and application use history data, and the FTC did not classify such data as

[20] *Proposal* at 2.

[21] Federal Trade Commission, *Protecting Consumer Privacy in an Era of Rapid Change* (Mar. 2012) (hereinafter *2012 Report*); See *e.g.,* Public Knowledge *et al.*, Opposition to the Petitions for Reconsideration, 4-6 (Mar. 6, 2017).

[22] *Id*. at 5.

"sensitive" in its 2012 Report.[23] This attempt to extrapolate from acts of Congress with respect to very different media than that presented here cannot be accepted.

The Oppositions claim that the FTC's 2012 Report is out of date, and that the online data discussed therein is not the same as the data subject to the Order.[24] In fact, this type of data was explicitly discussed in that report, and was not included in the FTC's definition of sensitive data.[25] Indeed, when the FTC looked at the collection and use of web browsing history for online behavioral advertising in 2009, it limited the definition of "sensitive" data to data about children, health, or finances, not general web browsing history.[26] This definitional distinction respects the reality that not all web browsing and application use information is sensitive, and that only when such information contains sensitive information (such as a Social Security number) should other requirements apply. The FTC has further noted the effectiveness of the industry self-regulatory program – the Digital Advertising Alliance ("DAA") – that grew out of that 2009 report with regard to the collection and use of web browsing and app usage data, most recently stating that "DAA [has] taken steps to keep up with evolving technologies and provide

[23] *2012 Report*.

[24] *Id*.

[25] "The Commission defines as sensitive, at a minimum, data about children, financial and health information, Social Security numbers, and certain geolocation data..." *2012 Report* at 47. The FTC maintained this definition for the term sensitive information when it commented on the FCC's proposed regime and discussed only the information categories of content of communications and Social Security numbers or health, financial, children's, or precise geolocation data. Federal Trade Commission, *Comment of the Staff of the Bureau of Consumer Protection of the Federal Trade Commission*, 20 (May 27, 2016).

[26] Federal Trade Commission, *2009 FTC Staff Report: February 2009 Self-Regulatory Principles For Online Behavioral Advertising*, 12 (2009).

important guidance to their members and the public. Their work has improved the level of consumer protection in the marketplace."[27] Then-Commissioner (now Chairman) Pai noted in his dissent, there are "vast differences between the Order's approach and the FTC's regime." Commissioner O'Rielly also stated that "requiring opt-in notice for web browsing history and application usage data is a significant departure from the FTC approach, which is the basis for current expectations," and that "there has been no evidence of any privacy harms" to justify this change in approach.[28] The Oppositions claim that the Order is consistent with the FTC's treatment of web browsing and app usage data; the FTC's continued treatment of such data (when not combined with other sensitive data) prove this claim to be without foundation.

IV. NO REGULATORY GAP WILL EXIST IF THE ORDER IS RECONSIDERED.

The Oppositions claim that without the Order, there will be no regulatory framework to oversee BIAS providers' privacy practices.[29] However, as the FCC itself stated in its May 2015 enforcement advisory, Section 222 will still apply to BIAS providers, and those entities will still be required to use good-faith efforts to comply with the law.[30] During that period, the FCC's Enforcement Bureau stated that:

> "[T]he Enforcement Bureau intends to focus on whether broadband providers are taking reasonable, good-faith steps to comply with Section 222, rather than focusing on technical details. By examining whether a broadband provider's acts or practices are reasonable and whether such a provider is acting in good faith to comply with Section 222, the Enforcement Bureau intends that broadband

[27] Federal Trade Commission, *Cross-Device Tracking*, 11 (Jan. 2017).

[28] Dissenting Stmt. of Comm'r Michael O'Rielly at 4.

[29] Federal Communications Commission, *Enforcement Bureau Guidance: Broadband Providers Should Take Reasonable, Good Faith Steps To Protect Consumer Privacy* (May. 20, 2015).

[30] *Id*.

> providers should employ effective privacy protections in line with their privacy policies and core tenets of basic privacy protections."[31]

BIAS providers operated under this standard during the intervening time preceding the Order, and the Oppositions have not discussed any concrete privacy harms during that time period that warrant the need for the unnecessary requirements in the Order.

V. THE FCC SHOULD ALLOW PROPER NOTICE AND COMMENT ON THE MATERIALLY DIFFERENT ORDER.

While the Oppositions claim otherwise, the Order was adopted less than a month after the Commission issued a four-page Fact Sheet outlining a drastic change in its approach to BIAS providers' use and sharing of customer information. The Fact Sheet did not afford a reasonable time, or provide appropriate or sufficient details, to allow interested parties to assess the new proposal and provide comments on it. Commission Rules at Section 1.415 require the Commission to "afford interested persons an opportunity to participate in the rulemaking proceeding through submission of written data, views, or arguments," and to provide a "reasonable time" for those comments to be provided.[32] While the Oppositions claim the Order to be a "logical outgrowth" of the NPRM, the language of the Order compared to the NPRM plainly show that contention to be false.[33] Such a substantial change from the NPRM to the significant changes included in the Order warranted at least the issuance of a Further Notice of

[31] *Id*. at 2.

[32] 47 C.F.R. § 1.415 (a) & (b).

[33] New America's Open Technology Institute, *Opposition to the Petitions for Reconsideration*, WC Docket No 16-106, 18 (Mar. 6, 2016) (Arguing that the Order is the "logical outgrowth" pf the proceeding because the Order could be anticipated in light of the initial notice).

Proposed Rule Making, pursuant to Commission rule 1.421,[34] a proposal suggested by the Trade Associations in an *ex parte* meeting on October 17, 2016, and one that is not sufficiently rebutted by the Oppositions.[35]

[34] 47 C.F.R. § 1.421.

[35] 4As, AAF, ANA, DMA, IAB, NAI, *October 17 Trade Association Ex Parte* (Oct. 18, 2016).

CONCLUSION

Accordingly, the Trade Associations maintain their respectful request for the FCC to deny the Oppositions and reconsider its decision to adopt the Order regarding the use and disclosure of data by broadband providers due to the inadequate procedures taken to adopt the Order, and the other infirmities in the Order that are discussed in this reply.

Respectfully submitted,

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